PUBLIC PROSECUTOR

v.

KOK SIEW HIONG

HIGH COURT BORNEO, SANDAKAN
CHARLES NC HO J
[CRIMINAL TRIAL NO. 3 OF 1984]
1 JULY 1986

CRIMINAL LAW: *Dangerous Drugs - Trafficking in a controlled drug - Presumptions - Prima facie case - Mandatory sentence.*

The police acting on information received went to a house around 8.30 p.m. Upon reaching the house some of the party lay in ambush outside while the rest went in and met the owner. The house was searched but nothing incriminating discovered. Around 9.30 p.m. the accused arrived carrying a plastic bag pressed to his chest. A policeman who was about 3 feet behind the accused called out "Kami Polis" whereupon the accused turned and attempted to run away. He was stopped and the bag in his hand taken away from him. When the bag was examined, it was found to contain 19 plastic packages each containing black substance which was later confirmed by the Government chemist's Department as chandu. The next day the accused was taken before a Magistrate and placed in remand. The Government Chemist gave evidence that the package contained 3132.88 grammes of prepared opium.

The accused gave evidence under oath. He had, he stated, been requested, by the owner of the fishing boat he worked on, to buy some eggs. He had subsequently spent some time on various activities. He had met an old man he did not know who asked him to deliver a package to the egg-seller indicating it contained medicine. It was this package that the police seized when he went to the seller's house. He further stated that he did not tell the Magistrate this story as he was afraid, and that was why he told the Magistrate that the drugs came from the ship.

Held:

[1] The prosecution had established a *prima facie* case against the accused. The expert evidence of the Government chemist established beyond any doubt that the contents of the plastic bag were prepared opium and its net weight was 3132.88 grammes. The unchallenged evidence of the police indicated that the accused was in possession of the plastic bag. The prosecution had adduced sufficient evidence of the presumption under s. 37(d) and s. 37(da) of the Dangerous Drugs Act 1952, to be raised against the accused. Accused should make his defence.

[2] The story of the accused must be rejected as it is difficult to believe. The story about the old man is fictitious. In any event he had told the Magistrate the parcel came from the ship when any reasonable and innocent man would have taken the opportunity of clearing himself by telling the Magistrate the truth as to the origin of the parcel. The evidence of the police on the other hand could be believed.

[3] Accordingly the defence had failed to rebut the presumptions raised. The defence had not raised any reasonable doubt as to the truth of the prosecution story and the prosecution had proved its case beyond all reasonable doubt.

[Accused convicted and sentenced to death.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39B(1)(a), (2)

For the DPP - Abdul Malik Hj. Ishak; SFC, Sabah
For the accused - Poon Ming Fung

JUDGMENT

Charles NC Ho J:

The charge against the accused read as follows:

> That you on 22 April 1983 at about 9.30 p.m. at house number 61, Kampong Sim Sim Tengah, Jalan Sim-Sim, in the District of Sandakan, in the State of Sabah, did traffic in dangerous drugs, to wit 3,132.88 grammes of prepared opium on your own behalf and that you have thereby contravened s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980), Act 234, and punishable under s. 39B(2) of the Act.

The charge was read and explained to the accused and he pleaded not guilty to it. Accused was defended by Counsel, Mr. Poon Ming Fung and the prosecution was conducted by Deputy Public Prosecutor, Encik Abdul Malik bin Hj. Ishak.

At the end of the trial on 22 May 1986, the accused was convicted on the charge preferred against him and the mandatory sentence was imposed upon him by the Court.

Briefly the facts relied upon by the prosecution are these: On 22 April 1983, PW4 (ASP Zainuddin Wahab) was attached to Anti-Narcotic Section Sandakan. On that day at about 8 p.m. he briefed some members of the police personnel attached to the section, namely P.C. Mohd. Din, P.C. Lazim, P.C. Hassan, P.C. Yunus, P.C. Matusin and P.C. Ahmadi. He briefed them on the information which he received which was about a male Chinese aged about 40 years, 5 feet 2 inches tall, medium built with short hair, wearing white glasses, with short sleeve shirt and wearing short pants. This man was expected to be carrying a plastic bag containing more or less 3 kg. of chandu to house No. 61 Sim Sim Tengah, Jalan Sim Sim at about 9.30 p.m. At about 8.30 p.m. PW4 and other police officers went to the house No. 61 in two separate cars belonging to PW4 and P.C. Yunus respectively. They went in civilian clothes. Upon reaching there and before going up the house PW4 instructed two of his men to make an observation and to lay an ambush outside the house. He instructed PW5 P.C. Ahmadi to position himself not far from the house. P.C. Lazim (PW7) with positioned further from the house, near an electric post. The rest of the party went up to the house with PW4 who met the owner of the house by the name of Taw Ah Lam. PW4 identified himself to the owner. He told the owner he wanted to search the house and the owner did not object. Nothing was found. PW4 then instructed the owner to go inside a room and to remain there and he was to come out only when he was instructed by PW4 to do so. PW4 and the other officers went into another room. There were 4 flourescent lights in the house, one in each room, one in the hall and one at the verandah. PW4 said that about 9.30 p.m. he saw accused standing right in front of the hall. Accused was carrying a plastic bag with both his hands, pressed to his chest. He also saw P.C. Ahmadi right behind accused (about 3 feet). Then he heard Ahmadi called out "Kami Polis". The accused turned around and wanted to run away. He made a right turn but P.C. Ahmadi stopped him by placing his hands on accused's shoulders. P.C. Ahmadi then shouted 'Tuan ada orang datang bawa barang'. As soon as he heard the shouting PW4 said he rushed out of the room and went directly to the accused. He grabbed the plastic bag from the accused. It felt heavy. The accused then squatted down. He looked pale and he was shivering. The other officers had also rushed out with PW4 who instructed P.C. Matusin (PW6) to handcuff the accused. Accused was then taken to a room.

In the room PW4 examined the contents of the plastic bag. He found inside it 19 plastic packages each containing black substance which he suspected to be chandu. When PW4 examined the plastic bag the accused and other members of the police party were present. PW4 put the 19 packages back to the plastic bag. They then came out of the room and PW4 gave instruction to the owner to come out. The owner was then taken to the police station by P.C. Yunus, P.C. Lazim and P.C. Matusin. PW4 and the others took the accused to the accused's house at Bangunan Fook Yin to make a search there but they found nothing. Upon arriving at the police station at about 10 p.m. PW4 lodged a report and at about 10.35 p.m. went to see ASP. Ibrahim and informed him about the arrest and the seizure of the chandu. He handed the plastic bag and its contents to ASP Ibrahim and requested him to conduct the investigation. ASP Ibrahim locked the exhibits in the safe. On 23 April 1983 at about 8.30 a.m. PW4 took the accused to the Magistrate for remand. At about 11.30 a.m. he went to ASP Ibrahim's office to pack the exhibits. ASP Ibrahim took the exhibits from the safe and he found all 19 packages were there. He put exhibits in a paper box and sealed it with celluloid tapes and marked it with an 'X'. He then wrapped the box with a piece of brown paper and again celluloid taped the package and marked an 'X' on it. He wrote the address of the Chemist Department on the package, tied it with a blue string and sealed the package with the 'Police Diraja Malaysia 308' seal. He prepared police form 31 and after that ASP Ibrahim put the package in his safe. At about 12.15 p.m. he took ASP Ibrahim to Taw's house together with P.C. Ahmadi and P.C. Lazim. Taw was in. He showed ASP Ibrahim the various positions taken by the police in and outside the house and the position of the accused when he first saw him. The two constables also showed the ASP their positions. ASP Ibrahim then prepared two sketch plans of the scene. On 9 May 1983, PW4 collected the exhibits (package) from ASP Ibrahim and took it to the chemist (PW1) who opened and examined it. He received 3 copies of the chemist report by registered mail on 28 June 1983 and on 30 June 1983 he served a copy of the report on the accused. On 8 July 1983 PW4 collected a package sealed with the seal of Chemist Department from PW1. Upon returning to Sandakan he handed the package to ASP Ibrahim who put it in the safe and locked it.

PW4 identified the accused as the man he arrested on 22 April 1983. He said accused was wearing a short sleeve shirt and short pants and wearing glasses. Under cross-examination PW4 said that accused did not look normal when he was arrested and they did not search his body because they found what they expected. He said that accused did not hold the plastic bag by the handle and there was no newspaper wrapping. Under re-examination he said he asked the accused 'Apa ini' (referring to the plastic bag) and the accused did not reply.

The first witness who saw the accused approach house No. 61 that night was PW7 (P.C. Lazim). According to him he positioned himself near a lamp-post not far from P.C. Ahmadi. He said there were houses near house No. 61. All the houses had lights. The weather was clear and visibility good. At about 9.45 p.m. he saw a male Chinese who passed his position towards house No. 61. The man was holding something, a plastic bag with his both hands against his chest. He followed the man. Then he saw Ahmadi come out from his position and followed the man. Then he saw the man walk up the staircase. Ahmadi was behind the accused and he behind Ahmadi. When the man entered the hall P.C. Ahmadi was at the verandah and he heard Ahmadi shouted 'Kami polis'. The man turned around and tried to run. Ahmadi stopped him by putting his hands on his shoulders. Ahmadi again shouted 'Tuan ada orang datang bawa barang'. The ASP and others rushed out of the room and the ASP snatched the plastic bag from the accused who turned pale in the face and he was shivering and squatted down. PW7 said PW4 and PW7 regarding the events which led to

the arrest of the accused. He told the Court *inter alia*, that he first saw the accused when he was about 40 feet away. He focussed his attention on the man and followed him from behind when he walked past him. When the man walked up to the verandah and about to enter the hall he reached the verandah and he shouted 'Kami polis'. The man turned around and tried to run. PW5 said he stopped the man by putting his hands on the man's shoulders and then shouted 'Tuan ada orang datang bawa barang'. ASP Zainuddin rushed out and snatched plastic bag held by the man who look pale. He was shivering and squatted down. He said he saw 19 packages in the plastic bag which was examined by ASP Zainuddin. Under cross-examination he said he did not see where accused came from. He only noticed him when he was about 40 feet away. When a question was put to him he said that the plastic bag was not wrapped in newspaper.

The owner of the house Taw Ah Lam (PW3) was called by the prosecution to testify. He told the Court that the house No. 61 at Sim Sim Tengah belongs to him and he has been living in it since 1956. He said that on 23 April 1983 five Malays came to his house and identified themselves to him as policemen. He identified ASP Zainuddin and the other police officers as those who came to his house in 1983. He allowed them to search his house and after that he was asked to sit in one of the rooms and he was also instructed to come out only when he was called. At about 9.30 p.m. the witness said that he heard them talking. He heard the words 'Tuan ada orang ambil barang'. He came out of the room when ASP told him to do so and he saw the ASP carrying a plastic bag. He also saw who was nicknamed 'blind Hong' handcuffed by the police. He said he did not know why accused came to house. the accused according to him did not live around there.

PW2, ASP Ibrahim Mohamad, was the investigation officer in this case. He said that on 22 April 1983 at about 10.45 p.m. he was informed by ASP Zainuddin about the arrest and Zainuddin handed a plastic bag with the 'Bata' on it. He examined it and found 19 packages containing dark substances which he suspected to be chandu. After examination he put the 19 packages back into the plastic bag and locked the exhibits in his safe. When ASP Zainuddin packed and sealed the exhibits he said he was present. He locked up the exhibits after they were packed and he never tampered with them. He told the Court that the exhibits were sent to the chemist on 9 May 1983 by ASP Zainuddin and 8 July 1983 ASP Zainuddin collected the package back from the Chemist and handed it to him for safe custody. He said he noticed the seals of the chemist Department on the package which was also on the package which was also tied up with a white string. He identified the exhibits in Court. PW2 also told the Court that he prepared the sketch plans which have been produced before the Court based on information given to him by ASP Zainuddin and the other officers.

It is clear from the evidence of PW2, PW4 that the same plastic bag and its contents seized by the police party on 22 April 1983 were sent to the Government Chemist Department for analysis. PW1 who examined the exhibits said that after he had analysed the exhibits he wrapped them up in the same way he received them. He sealed the package with the seal of 'Jabatan Kimia Cawangan Sabah, Malaysia' and tied it up with a white string. He handed the package to ASP Zainuddin on 8 July 1983. When a package was shown to this witness in Court he identified it as the one he handed to ASP Zainuddin. He examined the package in Court and said that his seals had not been tampered with and the strings were in order. He then opened the package in Court and identified the articles inside it as those sent to him for analysis by the police. He said that the 19 packages were not stuck together when he examined them and repacked them. The exhibits were produced and marked as exhibits in Court. As the 19 packages were stuck together they were marked together as Ex. P9. It is

also clear form PW1's evidence that the contents of the 19 small packages (plastic bags) were prepared opium. According to PW1 he took samples from each bag for the purpose of carrying on tests. The amounts he took from each bag was 10% or more of the total weight in each bag. He carried out 3 separate tests to determine the nature of those substances and all 3 tests showed positively that they were prepared opiums. He said they exhibits (Ex. P9) would come within the definition of prepared opium as defined under s. 2 of the Act. He also said that he weighed the contents of the 19 plastic bags and found their total net weight to be 3,132.88 grammes.

At the end of the prosecution case I was satisfied beyond reasonable doubt that the prosecution had established a *prima facie* case against the accused. PW1, the Government chemist, had given expert evidence in cases of this nature and I accepted him as an expert witness in this case. His evidence showed beyond any doubt that the contents of the plastic bag were prepared opium and their net weight was 3,132,8 grammes. The evidence of the police witnesses which had not been seriously challenged by the defence would clearly show that the accused was in possession of the said plastic bag as he was carrying it just before he was arrested. The prosecution had therefore adduced sufficient evidence for the presumptions under s. 37(d) and s. 37(da) of the Dangerous Drugs Act 1952 (revised 1980) to be raised against the accused. Accordingly I called upon the accused to make his defence.

The accused gave evidence under oath. He told the Court that he knew it was an offence to have in one's possession opium. He said that on 22 April 1983 that his fishing boat was anchored at the Sandakan fish market between 9.30 a.m. and 10 a.m. for the purpose of unloading the fish caught during the previous 3 days. After that he followed the boat to Tanah Merah together with the owner of the boat and others. At Tanah Merah the boat owner instructed him to buy some eggs if he went ashore. The owner told him to buy the eggs whenever he felt convenient. From 1 p.m. to 5 p.m. he was at Tanah Merah. He watched people playing cards in a house all the time expect when he went to the nearby coffee shop to have a cup of coffee at 2 p.m. After his dinner in the same shop he went back to the boat (between 5 p.m. and 6 p.m.) to get some fish from his refrigerator to be taken to an old man at Kg. Garam. After delivering the fish at Kg. Garam he went to the town by taxi. Between 6.45 p.m. and 8.45 p.m. he watched a show at the Cathay Cinema. After the show he went to the New Market to have tea. He then went back to a stall near Cathay Cinema to buy some sweets. After buying 10¢ worth of sweets he went back to the New Market. On his way there when he walked past the fish market he met a friend and old man of more than 60 years old whom he knew for about 6 months. The old man asked him where he was going and he answered that he was going to duck seller's place to buy eggs. Witness identified PW3 Taw Ah Lam as 'duck seller' in Court. He said he did not arrange to meet the old man there. He met him by coincidence. He said he thought of buying the eggs after the show and he knew he could get them from 'duck seller' who would also give special discount. The old man (Ah Wong) then handed him a bag and asked him to deliver it to 'duck seller' since he was going there. Ah Wong told him that the bag contained medicine. The package was wrapped in a piece of newspaper and was about 12" long and about 4" to 5" in width. He did not open to see what was inside and he did not smell it either. He held the bag in his right hand and pressed it against his right waist. He then walked to the taxi stand to get a taxi. He got off the taxi near the path leading down to the house. There were lights along the path. When he reached the catwalk there was someone near the lamp post. He was an old man of about 80 years old. As he walked further he saw a Malay near a coconut tree. He was sitting on the trunk of the coconut tree which had fallen down and he was wearing a T-shirt and had short hair. The man impressed him as a person working for the government.

He looked at the man who looked back. He did not bother about him and walked on. When he reached the house he walked up the staircase. He saw a man searching the house near the door. When he saw that he turned right and walked down the stairs. He said he intended to go downstairs to wait for him to finish the search. Someone called to him in Malay "Mari mari". He walked up again on hearing that and walked into the hall of the house still holding the package in his hand. The man then asked him what he was carrying. He said 'tidak tahu'. He was not afraid and he did not shiver or squat down. He just stood there. He handed the package to the man who placed it on a table in the hall and opened it. He opened the newspaper and then asked him if the contents were not chandu in Malay. He did not reply. He said he did not try to run. Under cross-examination the accused said that after his arrest he took the police to his room where they made a search. They found his passport and RM50. He said that the police witnesses lied in Court about the manner he carried the plastic bag. He said he did not see the plastic bag which was wrapped in a piece of newspaper and he did not know what was inside. He also said he had never met those police officers before 22 April 1983 and they had no grudge against him. He thought the bag contained medicine because Ah Wong said so and he believed Ah Wong. He did not know how to say medicine in Malay at that time so he said 'tidak tahu'. He did not tell PW3 about the contents of the package because he already told the police that he did not know. He also did not tell PW3 that Ah Wong asked him to bring the plastic bag to him. On questions put to him by the learned Deputy Public Prosecutor the accused denied that he turned pale and tried to run away. He also denied that he shivered and squatted down. He said no one put his hands on his shoulders. He said he told his lawyers about the bag being wrapped by newspaper. The accused also told the Court that the next day after his arrest he was brought before a Magistrate and he was remanded. He did not tell the Magistrate about Ah Wong giving the package to him. When he was asked by the Magistrate where the drugs came from he told the Magistrate, that they came from the ship. He lied to the Magistrate because he was afraid then. He had never appeared before the Court before then. He denied that he lied about Ah Wong. The accused identified P.C. Matusin as the man who called 'mari mari' and he said he told his lawyer about Matusin. On being asked by the Court he said he told the police about Ah Wong when he was being put into the vehicle that night. He did not tell his lawyer about that because he did not asked him.

I found it very difficult to accept the story of the accused that his purpose of going to PW3's house was to buy some eggs because Taw would give special discount. The accused did not say how many eggs he was to buy from Taw. It had to be a big number to make it worthwhile to go all the way there by taxi and perhaps to return by taxi as well and at that hour of the night. I also found it very difficult to accept the story of the accused about Ah Wong and that the accused carried the package for the old man without knowing what was inside it except that it contained medicine as Ah Wong had told him. I found Ah Wong to be a fictitious person and the accused invented the story of meeting him at the fish market by coincidence. If Ah Wong did in fact exist and had asked the accused to carry the plastic bag to PW3 any reasonable person in the situation the accused in would have straightaway explained to Taw that the plastic bag was intended for him that it contained medicine and mentioned the name of Ah Wong when Taw came out of the room. The accused must have known then that he was being arrested because of the contents of the plastic bag. I could not believe that the accused who was born and brought up in Sandakan and worked as a fisherman did not know how to say medicine in Malay. The accused had another opportunity to explain away the plastic bag he carried. He was brought before the Magistrate the next day and he was asked about the contents of the plastic bag. Instead of telling the Magistrate

about Ah Wong he told the Magistrate that the drugs were from the ship. His explanation for this was that he was afraid as he had never appeared before the Court before then. It would have been much easier and any reasonable innocent person would have taken the opportunity to clear himself by telling the Magistrate about Ah Wong if he really existed instead of telling the Magistrate a lie as he said he did. For these reasons I rejected those parts of the accused's story. I also rejected the accused's story regarding the events immediately before his arrest. The police witnesses' accounts of the arrest and the evidence of PW3 were hardly challenged and questions were not put to them along the lines of the accused's version (though this might be in part with respect, due to the inexperience of defence counsel.) I was satisfied that those witnesses were truthful witnesses. Accordingly I found the defence failed to rebut the presumptions raised on the balance of probability. I was satisfied that the prosecution had proved its case beyond of any reasonable doubt and the defence had not raised any doubt in my mind as to the truth of the prosecution case and so I convicted the accused on the charge preferred against him and imposed the mandatory death penalty upon the accused.

Also found at [1988] 2 CLJ 316